

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FUEL MEDICAL, LLC, a Washington
limited liability company,

Plaintiff,

v.

SONOVA USA INC., a Minnesota
corporation,

Defendant.

Case No. 3:22-cv-5934-BHS

DEFENDANT SONOVA USA INC.'S
MOTION TO DISMISS FIRST AMENDED
COMPLAINT

NOTE ON MOTION CALENDAR:
OCTOBER 13, 2023

I. OVERVIEW AND RELIEF REQUESTED

Defendant Sonova USA Inc. ("Sonova") respectfully requests that this Court dismiss the First Amended Complaint of Plaintiff Fuel Medical Group, LLC ("Fuel Medical"), Dkt. 35, in its entirety, pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6).

On June 12, 2023, this Court dismissed all of Fuel Medical's claims against Sonova. Dkt. 22. The Court, however, granted Fuel Medical the opportunity to replead its claim for fraud, as well as its claims based on its allegations that Sonova misused Fuel Medical's confidential information and trade secrets. Fuel Medical filed its First Amended Complaint on August 25, 2023, but its second bite at the apple fares no better than the first, and all of its claims should now be dismissed with prejudice.

1 Fuel Medical continues to base its fraud claim on alleged representations by Sonova
 2 about its intention and desire to enter into a new supply agreement with Fuel Medical. None of
 3 those representations, however, can support a claim for fraud because each of them expressed a
 4 prediction about future performance. Fuel Medical fails, yet again, to allege the
 5 misrepresentation of an existing fact.

6 Fuel Medical similarly fails to remedy the fatal flaws of its claims involving its alleged
 7 “confidential information” and “trade secrets.” Fuel Medical continues to rely exclusively on
 8 vague and conclusory allegations regarding “pricing tier information” that do not sufficiently
 9 explain what actually constitutes the confidential or trade secret information. At best, these
 10 claims accuse Sonova of using its own prices and pricing information to make decisions about
 11 what to charge its customers for its products.

12 The Amended Complaint also adds a new claim for breach of contract. That claim,
 13 however, relies on a misreading of the Supply Agreement that would, in effect, result in an
 14 unintended windfall to Fuel Medical of payments that expressly belong to Sonova under the
 15 terms of the Agreement.

16 II. FACTUAL ALLEGATIONS

17 Sonova manufactures hearing instruments and “sells them to physicians, private practice
 18 audiology businesses, and hearing instrument dispensing businesses.” Dkt. 35 ¶ 2. It is the
 19 corporate successor to Phonak, LLC, which contracted on August 23, 2010, with Fuel Medical
 20 “to sell hearing instruments to Fuel Medical’s ‘Network Members.’” *Id.* ¶¶ 2, 9-10. On March 1,
 21 2017, the parties entered into a new supply agreement (the “Supply Agreement”) under which
 22 Phonak and another Sonova predecessor, Unitron Hearing, Inc., “could sell products to Fuel
 23 Medical’s members in exchange for paying ‘Revenue Sharing Payments’ to Fuel Medical.” *Id.* ¶
 24 13. The parties agreed that the Supply Agreement would continue for a period of three years, and
 25 then automatically renew for two successive renewal terms of one year each, unless otherwise
 26 terminated. *Id.* ¶ 23; Ex. A § 2.01. In other words, the parties only contracted for two automatic

1 renewals; if the parties did not reach agreement on a new contract at the end of the second
2 renewal, the Supply Agreement would terminate of its own accord. *Id.*

3 The Supply Agreement also establishes the system by which Sonova charged Fuel
4 Medical's members for purchasing Sonova's products. *Id.* ¶ 21. Specifically, the Supply
5 Agreement provides Sonova "shall invoice Network Members directly for purchases [of Sonova
6 products] under this Agreement," and "[n]othing in this Agreement shall be construed as limiting
7 [Sonova's] right to change its published list prices at any time, in its sole and absolute
8 discretion." *Id.*, Ex. A §§ 4.02, 4.03. It further provides "[Sonova] and Fuel Medical shall
9 establish and maintain pricing templates for the Network Members. Fuel Medical and [Sonova]
10 may, from time to time, change the strategic pricing templates by mutual written agreement of
11 both parties." *Id.* § 4.02.

12 The Supply Agreement includes a confidentiality provision, which provides the parties
13 would not use or disclose information it received from the other party on a confidential basis. *Id.*
14 § 7.04. The confidentiality provision excludes from its protections, *inter alia*, information that
15 "becomes available to the Receiving Party on a non-confidential basis from a source other than
16 Providing Party," and information that "was in the Receiving Party's possession prior to the
17 receipt from the Providing Party." *Id.* It also specifically excludes "the identities of the Network
18 Members" from the definition of "Confidential Information." *Id.*

19 The parties agreed that none of the terms of the Supply Agreement could be modified or
20 waived absent a written agreement signed by both parties. *Id.* § 7.07. The Supply Agreement also
21 includes an integration clause that states neither party "executed this agreement in reliance upon
22 any statement or omission" made by the other party. *Id.* § 7.23.

23 On January 30, 2018, Sonova and Fuel Medical executed a Non-Disclosure Agreement
24 (the "NDA"), which provides the parties would keep confidential and not disclose certain
25 "Information" that either received on a confidential basis from the other party. *Id.*, Ex. B. The
26 NDA specifically excludes from its protections, *inter alia*, information "that becomes available

1 to the Receiving Party on a non-confidential basis from a source other than the Providing Party,”
 2 and information that “was in the Receiving Party’s possession prior to the receipt from the
 3 Providing Party.” *Id.* § 2.

4 The parties operated under the Supply Agreement through its first term, and each of the
 5 two renewal terms that were automatically triggered. *Id.* ¶ 23. The second one-year renewal term
 6 was set to expire at the end of February 2022. On February 2, 2022, Sonova sent Fuel Medical a
 7 proposed draft of a new agreement. *Id.* Between February and September 2022, Fuel Medical
 8 and Sonova continued to negotiate the terms of a new supply agreement. *Id.* ¶¶ 24-26, 29.

9 During the same period, Fuel Medical and Sonova executed a total of eight amendments
 10 to the Supply Agreement, each of which extended its terms to a date certain to allow for
 11 negotiations to continue. *Id.* ¶¶ 24-26, 35-36. The eighth and final amendment, which the parties
 12 fully executed on September 8, 2022, provided that the Supply Agreement would expire on its
 13 own terms on September 15, 2022. *Id.* ¶ 36; Ex. A at 38-39.

14 On September 15, 2022, Sonova scheduled a call with Fuel Medical for 5:00 p.m. Pacific
 15 Standard Time. *Id.* ¶ 37. On that call, Sonova’s Vice President of Commercial Sales, Jason
 16 Mayer, informed Fuel Medical that the Supply Agreement would terminate on its own terms as
 17 of September 16, 2022. *Id.* Shortly thereafter, Sonova informed Fuel Medical that it was
 18 withholding \$500,000 of Revenue Sharing Payments for the month of September 2022 pursuant
 19 to the terms of the Supply Agreement. *Id.* ¶ 41.

20 On November 29, 2022, Fuel Medical filed its original complaint in this action, alleging
 21 that: Sonova breached the Supply Agreement’s notice provisions and the covenant of good faith
 22 and fair dealing by terminating the Agreement prematurely and without notice; Sonova engaged
 23 in fraud by representing that it intended to enter a new supply agreement; Sonova breached the
 24 Supply Agreement’s confidentiality provision and the NDA and misappropriated Fuel Medical’s
 25 trade secrets by using Fuel Medical’s “pricing information;” and that Sonova was liable under
 26 the doctrine of promissory estoppel for failing to fulfill its alleged promise to enter into a new

1 supply agreement with Fuel Medical. *See* Dkt. 1 ¶¶ 58-112. Sonova moved to dismiss the
 2 complaint in its entirety. Dkt. 12.

3 On June 12, 2023, this Court dismissed with prejudice Fuel Medical’s claims relating to
 4 the termination of the Supply Agreement, as well as its claim for promissory estoppel (Counts I,
 5 II, & VII). *See* Dkt. 22 at 9-13, 22-23. The Court held that Sonova did not prematurely terminate
 6 the Agreement and that the Agreement expired of its own terms on September 16, 2022. *Id.* at
 7 10. The Court also dismissed Fuel Medical’s fraud claim because it was based exclusively on
 8 alleged statements as to future performance. However, “out of an abundance of caution,” the
 9 Court dismissed the fraud claim without prejudice and granted Fuel Medical leave to amend. *Id.*
 10 at 14-15. Finally, the Court held that Fuel Medical failed to state a claim for breach of the
 11 confidentiality provision, breach of the NDA, and misappropriation of trade secrets (Counts IV,
 12 V, & VI) because Fuel Medical’s complaint contained “no specific, non-conclusory factual
 13 allegations” indicating that the alleged “pricing information” was confidential or constituted
 14 trade secrets. *Id.* at 18-20. The Court dismissed those claims without prejudice and granted Fuel
 15 Medical leave to amend. *Id.*

16 On August 25, 2023, Fuel Medical filed its First Amended Complaint. Dkt. 35. The
 17 Amended Complaint alleges a new claim that Sonova breached Section 5.01 of the Supply
 18 Agreement by withholding \$500,000 of the September 2022 Revenue Sharing Payments
 19 (Count I). *Id.* ¶¶ 51-58. Fuel Medical also repleads its claims for fraud (Count II), breach of the
 20 confidentiality provision of the Supply Agreement (Count III), breach of the NDA (Count IV),
 21 and trade secret misappropriation (Count IV).

22 III. LEGAL STANDARDS

23 Sonova seeks dismissal of all of Fuel Medical’s claims pursuant to Rule 12(b)(6). To
 24 survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must
 25 contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its
 26 face. *Taylor v. Sullivan*, No. 13-cv-1479, 2014 WL 1089439, at *1 (W.D. Wash. Mar. 14, 2014).

1 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
 2 allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires
 3 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
 4 will not do.” *Akmal v. Centerstance, Inc.*, No. 11-cv-5378, 2013 WL 1499058, at *5 (W.D.
 5 Wash. Apr. 11, 2013) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
 6 Additionally, if a claim “is not based on a proper legal theory, it should be dismissed.” *Id.*

7 Sonova also seeks dismissal of Fuel Medical’s fraud claim (Count II) pursuant to
 8 Rule 9(b) in addition to Rule 12(b)(6). The Court should dismiss a fraud claim if the allegations
 9 fail to state the “time, place and specific content of the false representations as well as the
 10 identities of the parties to the misrepresentation.” *Segal Co. (E. States), Inc. v. Amazon.com*, 280
 11 F. Supp. 2d 1229, 1231 (W.D. Wash. 2003) (quoting Fed. R. Civ. P. 9(b)). “General or
 12 conclusory allegations of fraud are insufficient to defeat a motion to dismiss.” *Id.*

13 IV. ARGUMENT

14 A. FUEL MEDICAL FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT 15 BASED ON THE \$500,000 HOLDBACK (COUNT I).

16 Fuel Medical alleges that Sonova breached Section 5.01 of the Supply Agreement when it
 17 withheld \$500,000 of the September 2022 Revenue Sharing Payments. Dkt. 35 ¶¶ 50-58. It
 18 alleges that Sonova was not entitled to hold back Revenue Sharing Payments because Sonova did
 19 not provide Fuel Medical with “contractual notice of termination.” Dkt. 35 ¶ 54.

20 Fuel Medical misreads Section 5.01 of the Supply Agreement. Fuel Medical claims
 21 Sonova was entitled to withhold Revenue Sharing Payments in the event of a termination under
 22 Section 2.02 (“Termination Without Cause”) or 2.03 (“Termination With Cause”). The
 23 Agreement permits Sonova to withhold a portion of Revenue Sharing Payments “in the event of
 24 a notification of termination” of the Agreement. The agreement does not specify that a party
 25 must provide a notification of termination independently of the expiration of the Term to which
 26 the parties expressly agreed in Section 2.01.

1 Fuel Medical's interpretation of Section 5.01 does not make sense because it would mean
 2 that parties planned for how to calculate and reconcile any necessary adjustments to the Revenue
 3 Sharing Payments in the event of a termination prior to the end of the Term, but not in the event
 4 of a termination at the known expiration of the Term. Here, both parties had notification of
 5 termination of the Agreement when they entered the final extension agreement specifying the
 6 Supply Agreement's Term would expire on September 15, 2022 if the parties did not reach
 7 agreement on renewal. Dkt. 35 ¶ 36. Further, on September 15, 2022, Sonova informed Fuel
 8 Medical it would not enter any further extensions and would allow the Supply Agreement to
 9 expire on its own terms. *Id.* ¶ 37. Accordingly, as of that date, the Agreement terminated and
 10 Sonova was entitled to withhold a portion of the Revenue Sharing Payments pursuant to the
 11 terms of Section 5.01.

12 Additionally, even if Fuel Medical's interpretation of the notice of termination
 13 requirement were somehow correct, Fuel Medical would not be entitled, under any
 14 circumstances, to a return of the entire \$500,000 Holdback. Fuel Medical fails to acknowledge
 15 that Section 5.01 establishes that Revenue Sharing Payments are based only on Net Revenue,
 16 which is defined as "gross purchases of hearing aids and accessories less returns, refunds,
 17 allowances, discounts of any nature and promotions." Quite simply, Net Revenue is *net* of
 18 refunds, returns, and allowances for non-payments. The Supply Agreement also expressly
 19 provides that Fuel Medical is not entitled to Revenue Sharing Payments paid on Net Purchases
 20 where full payment is not received within a specified period of time. Thus, in no event may Fuel
 21 Medical keep Revenue Sharing Payments for sales where the products were returned or refunded
 22 or for which Sonova does not receive payment within 120 days of the date of invoice. Not
 23 permitting the necessary offsetting of returns and unpaid invoices from the Revenue Sharing
 24 Payments upon the natural expiration of the Agreement would result in an unintended and
 25 unwarranted windfall to Fuel Medical.
 26

1 The Supply Agreement entitles Sonova to withhold a portion of the final Revenue
 2 Sharing Payments due to Fuel Medical until the Net Revenue and past due invoice amounts are
 3 accurately calculated. To the extent Fuel Medical intends to allege Sonova has failed to
 4 accurately calculate the Net Purchases, its claim should be one for an accounting; accordingly, its
 5 claim for breach of contract (Count I) should be dismissed.

6 **B. FUEL MEDICAL FAILS TO REMEDY THE FATAL DEFECTS IN ITS**
 7 **ORIGINAL FRAUD CLAIM; IT STILL RELIES EXCLUSIVELY ON**
 8 **SONOVA’S ALLEGED MISREPRESENTATIONS OF FUTURE INTENTION**
 9 **(COUNT II).**

10 Fuel Medical’s fraud allegations remain substantively unchanged in its Amended
 11 Complaint, despite the Court’s plain holding that those allegations were insufficient to state a
 12 claim for fraud. Fuel Medical’s amended allegations do not remedy the fatal flaws of its fraud
 13 claim, and it should therefore now be dismissed with prejudice.

14 Under Washington law,¹ a plaintiff must show, *inter alia*, a misrepresentation “of an
 15 **existing fact.**” *Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166 (2012) (emphasis
 16 added). A statement as to future performance is not a representation of an existing fact and,
 17 therefore, cannot support a claim for fraud. *Shook v. Scott*, 56 Wn. 2d 351, 355 (1960).

18 The Court dismissed Fuel Medical’s fraud claim from its original complaint because it
 19 was “based primarily on alleged statements as to future performance.” Dkt. 22 at 14. Fuel
 20 Medical does not remedy that fatal problem in its Amended Complaint. Its fraud claim is still
 21 based only on alleged representations of some future intention, prediction, or desire that the
 22 parties will reach a renegotiated agreement. *See* Dkt. 35 ¶ 29 (Jason Mayer “was supportive of
 23 the Fuel relationship and represented that the Parties were on track to enter a new agreement”); ¶
 24 31 (Monica Murray said Sonova would “never drop Fuel Medical without notice”); ¶ 32 (Greg
 25 Guggisberg “repeatedly assured Fuel Medical that a new contract was imminent”); ¶ 33 (Arnd

26 ¹ In its motion to dismiss the original complaint, Sonova argued that Washington law applies to the fraud claim, and the Court agreed. Dkt. 22, n. 4.

1 Kaldowski said that Sonova “wanted to address the ‘next ten years’ with Fuel Medical”); ¶ 60
 2 (“Sonova repeatedly assured Fuel Medical that it *intended* to renegotiate a new supply
 3 agreement with Fuel Medical.”) (emphasis added); ¶ 63 (“[Sonova] would never think of leaving
 4 [Fuel Medical]”).

5 “Where the fulfillment or satisfaction of the thing represented depends upon the
 6 occurrence of a future event, or upon particular future use, or future requirements of the
 7 representee, then the representation is not of an existing fact.” *Shook*, 56 Wn.2d at 355. Each of
 8 the alleged representations in the Amended Complaint depend upon the occurrence of a future
 9 event or some future action by Sonova—*i.e.*, that Sonova would ultimately enter into a new
 10 agreement with Fuel Medical. Thus, they are not representations of an existing fact and cannot
 11 support a claim for fraud.

12 Fuel Medical’s fraud claim also fails because it does not establish how the allegedly
 13 fraudulent statements were false. *See Elcon Const., Inc.*, 174 Wn. 2d at 166 (“falsity” is a
 14 required element of a fraud claim). In fact, Fuel Medical’s allegations, taken as true, establish
 15 that, at various points in time, Sonova *did* intend to renegotiate a new supply agreement. *See*
 16 Dkt. 35, ¶¶ 23-26. Indeed, the parties extended the term of the Supply Agreement eight times to
 17 allow for continued negotiations. *Id.* ¶¶ 24-31, 35-36. The Amended Complaint does not
 18 specifically allege how each alleged representation was false and Fuel Medical’s fraud claim
 19 fails as a result.

20 Moreover, despite having the opportunity to plead and supplement its allegations, Fuel
 21 Medical still fails to satisfy the pleading requirements for a fraud claim under Federal Rule of
 22 Civil Procedure 9(b). Under Rule 9(b), fraud must be pled with particularity and must state the
 23 “time, place and specific content of the false representations as well as the identities of the
 24 parties to the misrepresentations.” *Capitol W. Appraisals, LLC v. Countrywide Fin. Corp.*, 759 F.
 25 Supp. 2d 1267, 1271 (W.D. Wash. 2010). Fuel Medical does not allege the location in which any
 26 of the alleged statements occurred, nor does it allege the time or specific content of many of the

1 alleged statements. *See* Dkt. 35 ¶ 32 (no specifics as to time and specific content of alleged
 2 statement); ¶¶ 29, 32, 33, 60, 63 (no specific allegations as to location). Fuel Medical's
 3 allegations are insufficiently detailed under Rule 9(b) and should therefore be dismissed.

4 **C. FUEL MEDICAL'S ALLEGATIONS FAIL TO STATE CLAIMS FOR BREACH**
 5 **OF THE SUPPLY AGREEMENT'S CONFIDENTIALITY PROVISION (COUNT**
 6 **III) AND BREACH OF THE NDA (COUNT IV).**

- 7 1. Fuel Medical's new allegations fail to distinguish the "pricing tier information"
 8 from the "pricing templates" contemplated by the Supply Agreement and
 9 Sonova's own pricing.

10 This Court ordered Fuel Medical to explain how the "pricing tiers" in question were
 11 distinct from the "pricing templates." Fuel Medical not only fails to do so, it concedes that the
 12 pricing tiers are the same as the pricing templates and repeats its vague allegations that
 13 "information related to its pricing tiers" was confidential. *See* Dkt. 35 ¶¶ 67-82. These claims
 14 (Counts III & IV), as alleged in the Amended Complaint, suffer from the same fatal defects as
 15 Fuel Medical's original claims for breach of the confidentiality provision and NDA.

16 In its order dismissing Fuel Medical's first complaint, this Court provided guidance as to
 17 what was necessary for these claims to survive. Specifically, the Court held that Fuel Medical
 18 "must allege specific, non-conclusory facts explaining (1) what, exactly, 'pricing tiers' are,
 19 (2) how both the discounts and 'pricing tiers' in question are distinct from the 'pricing templates'
 20 contemplated by the Supply Agreement, and (3) why both the discounts and 'pricing tiers' in
 21 question were, in fact, confidential" and subject to the terms of the NDA. Dkt. 22 at 18-20. Fuel
 22 Medical's new allegations do not satisfy any of those requirements.

23 Rather than explaining how the "pricing tiers" are distinct from the "pricing templates"
 24 addressed in the Supply Agreement, Fuel Medical's new allegations acknowledge that they are
 25 one and the same. Indeed, in paragraph 14 of the Amended Complaint, Fuel Medical uses the
 26 terms "pricing tier" and "strategic pricing templates" interchangeably. Dkt. 35 ¶ 14.
 Additionally, Fuel Medical alleges that "Fuel Medical and Sonova worked together to set prices
 for the tiers." *Id.* ¶ 49. That allegation is consistent with Section 4.02 of the Supply Agreement,

1 which provides that “[Sonova] **and** Fuel Medical shall establish and maintain pricing templates
 2 for the Network Members. Fuel Medical **and** [Sonova] may, from time to time, change the
 3 strategic pricing templates by mutual written **agreement of both parties.**” *Id.*, Ex. A § 4.02
 4 (emphasis added). Under the Supply Agreement, any “pricing tier information” was not Fuel
 5 Medical’s proprietary or confidential information. It was Sonova’s own information—i.e., “**its**
 6 published list prices”—which Sonova could change at any time in its discretion. *Id.*

7 To the extent Fuel Medical tries to argue its alleged “pricing tier information” are distinct
 8 from the “pricing templates,” it relies on conclusory allegations that conflict with the express
 9 terms of the Supply Agreement. Fuel Medical goes so far as to allege that “the prices ultimately
 10 charged to Fuel Medical’s members are determined by Fuel Medical’s proprietary tier system,
 11 and not by Sonova.” Dkt. 35 ¶ 49. The express terms of the Supply Agreement, however, provide
 12 that Sonova had the right to change its prices unilaterally at any time, and that Sonova was
 13 exclusively responsible for invoicing Network Members directly. Ex. A §§ 4.02, 4.03. The
 14 Supply Agreement, which controls over Fuel Medical’s contradictory allegations, demonstrates
 15 that, at all times, Sonova had access to and control over the product pricing information it
 16 charged Network Members. *See Bakke v. Clark Cnty. Jail*, 2015 WL 603528, at *1 (W.D. Wash.
 17 Oct. 15, 2015) (“[I]f an exhibit attached to a complaint contradicts an assertion in the complaint
 18 and reveals information that prohibits recovery as a matter of law, the information provided in
 19 the exhibit trumps the allegation in the complaint.”).

20 Further, if Fuel Medical’s allegations were true and the pricing information used to
 21 charge Network Members for Sonova’s products was Fuel Medical’s confidential and
 22 proprietary information, it would lead to an absurd result. The necessary implication of those
 23 allegations would be that Sonova does not have control over the prices it charges its customers
 24 for its own products. As a practical matter, it would mean that Sonova is prohibited from making
 25 decisions about the pricing it offers to various customers for its products upon the expiration of
 26

1 its contractual relationship with Fuel Medical. Such a result would effectively preclude Sonova
2 from continuing to sell its products to customers who happen to be in Fuel Medical's network.

3 The terms of the Supply Agreement establish that any "pricing tier information" was not
4 Fuel Medical's information. Sonova had the right to change its prices at any time in its
5 discretion, and Sonova and Fuel Medical collaborated to establish the pricing templates—*i.e.*, the
6 "pricing tiers"—into which Network Members were placed. Sonova's use of its own pricing
7 information cannot serve as the basis for a claim for breach of the Supply Agreement's
8 confidentiality provision or the NDA. Accordingly, Counts III and IV should be dismissed with
9 prejudice.

- 10 2. To the extent the "pricing tier information" is something other than Sonova's
11 pricing and the "pricing templates," Fuel Medical's claims fail because they do
not sufficiently identify the confidential information at issue.

12 Fuel Medical concedes the pricing tier information is the same as the pricing templates. If
13 it attempts to argue otherwise, its claim still must fail because then the Amended Complaint fails
14 to explain what, exactly, the "pricing tier information" is. Despite the Court's clear admonition,
15 Fuel Medical still relies on vague and conclusory allegations that are insufficient to survive
16 under Rule 12(b)(6). *See* Dkt. 22 at 19 (Court's instruction that "Fuel Medical must allege
17 specific, non-conclusory facts explaining (1) what, exactly, 'pricing tiers' are").

18 Throughout its Amended Complaint, Fuel Medical employs ambiguous descriptions of
19 and references to its "confidential and proprietary tier-based pricing," "proprietary pricing
20 system," and the "proprietary combination of factors." *See, e.g.*, Dkt. 35 ¶¶ 14, 46-47, 68. Those
21 descriptions do not provide the detail necessary for Sonova to understand and identify the
22 information at issue, or the manner in which Sonova is alleged to have obtained and improperly
23 used that information. Accordingly, Fuel Medical's allegations relating to the confidential
24 information are insufficient to state claim under Rule 12(b)(6). *See Cascade Designs Inc. v.*
25 *Windcatcher Tech. LLC*, No. 15-cv-1310, 2016 WL 374564, at *3 (W.D. Wash. Feb. 1, 2016)
26 ("A complaint must identify the confidential information that was allegedly disclosed to survive

a 12(b)(6) motion.”) (cleaned up); *Int’l Quality & Productivity Center/Penton Learning Sys., LLC v. Eck*, 1999 WL 35353, at *6 (N.D. Ill. Jan. 11, 1999) (dismissing counterclaim where defendant “failed to identify any details regarding” regarding the confidential information at issue); *cf. Wiggins v. Physiologic Assessment Servs. Inv.*, 141 A.3d 1058, 1065 (Del. Super. Ct. 2016) (denying motion to dismiss where defendant “devoted an entire section of its counterclaim” to listing and specifying the confidential information at issue).

D. FUEL MEDICAL’S CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS (COUNT VI) FAILS FOR MULTIPLE REASONS.

Fuel Medical alleges that “Sonova was not authorized to retain or use Fuel Medical’s trade secret information, including its pricing tiers,” but that “Sonova has used Fuel Medical’s pricing tiers to compete directly with Fuel Medical by selling to Fuel Medical’s network and Fuel Medical’s contractors.” Dkt. 35, ¶¶ 90-91. This claim fails for the multiple reasons, including the same reasons that its claims for breach of the Supply Agreement’s confidentiality provision and NDA fail.

1. The alleged “pricing tier information” is not trade secret information under the Washington Uniform Trade Secrets Act.

Information cannot constitute a “trade secret” under the WUTSA² if it is “readily ascertainable by proper means” from a source other than the purported owner of the information. *Boeing Co. v. Sierracin Corp.*, 108 Wn. 2d 38, 48, 738 P.2d 665, 674 (1987) (citing RCW 19.108.010(4)(a)). The “pricing tier information” described in the Amended Complaint is not a trade secret because it was readily ascertainable to Sonova at all times.

As set forth in detail above, the Supply Agreement provides that Sonova had the right to change its prices at any time in its discretion, and that Sonova was responsible for invoicing all Network Members directly. Dkt. 35, Ex. A §§ 4.02, 4.03. Thus, Sonova always had access to the

² Fuel Medical’s complaint does not reference WUTSA and appears to attempt to state a common law claim for trade secret misappropriation. Regardless of whether Fuel Medical specifically cites the statute, it must satisfy WUTSA’s requirements to state a claim. *See* RCW 19.108.100 (WUTSA displaces common law pertaining to civil liability for misappropriation of a trade secret).

1 “pricing tier information” because it created that information—*i.e.*, the prices it charged to Fuel
2 Medical’s members—and Sonova owned it.

3 Similarly, the express terms of the Supply Agreement belie Fuel Medical’s allegations
4 that “Fuel Medical only provides its pricing to specific clients or contractors after taking
5 reasonable steps to maintain the secrecy of the pricing information,” and that “Sonova agreed
6 that Fuel Medical’s pricing and pricing model was Confidential Information” *Id.* ¶¶ 87-88; *see*
7 *Bakke*, 2015 WL 6032508, at *1 (exhibits control over contrary allegations in the complaint).
8 Pursuant to the Supply Agreement, Fuel Medical and Sonova collaborated and agreed upon the
9 strategic pricing offered to Network Members. *Id.* Ex. A §§ 4.02, 4.03. The “tiers” or
10 “templates” and the corresponding pricing were readily available to Sonova through proper
11 means because they were developed **by Sonova**. Accordingly, the alleged “pricing tier
12 information” cannot serve as the basis for a trade secret misappropriation claim. *Boeing*, 108
13 Wn.2d at 48, 738 P.2d at 674.

14 2. Alternatively, Fuel Medical’s allegations regarding the alleged trade secrets at
15 issue are fatally vague.

16 To the extent that Fuel Medical attempts to contend the “pricing tier information” is
17 something other than the “pricing templates” covered by the Supply Agreement and Sonova’s
18 own list prices, the Amended Complaint fails to identify sufficiently the trade secrets Sonova
19 allegedly misappropriated. “While a plaintiff need not disclose its alleged trade secrets in such
20 detail that it would result in public disclosure of those trade secrets, they must sufficiently
21 identify those alleged trade secrets such that the other party is on notice of what it is alleged to
22 have misappropriated.” *Olson Kundig, Inc. v. 12th Ave. Iron, Inc.*, No. 22-cv-825, 2022 WL
23 4534422, at *7 (W.D. Wash. Sept. 28, 2022). Fuel Medical vaguely alleges that Sonova
24 misappropriated its “pricing tier information,” but does not provide any further detail as to what
25 specific information would constitute a trade secret.
26

1 The complaint's ambiguous references to "pricing tier information" are inadequate to put
 2 Sonova on notice of the trade secret Fuel Medical alleges it took, especially in light of the fact
 3 that Sonova was, at all times, in control of the prices it charged to its customers. Accordingly,
 4 Fuel Medical's trade secret misappropriation claim should be dismissed. *See Bombardier v.*
 5 *Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d 1169, 1178 (W.D. Wash. 2019) (complaint must
 6 "identify the trade secret with sufficient particularity to permit the defendant to ascertain at least
 7 the boundaries within which the secret lies"); *see also Imax Corp. v. Cinema Techs., Inc.*, 152
 8 F.3d 1161, 1167 (9th Cir. 1998) (plaintiffs "must *clearly refer* to tangible trade secret material"
 9 rather than referring to material "which *potentially* qualifies for trade secret protection")
 10 (emphasis orig.).

11 **E. THE SUPPLY AGREEMENT EXPRESSLY BARS FUEL MEDICAL FROM**
 12 **SEEKING PUNITIVE DAMAGES (COUNT II), EXEMPLARY DAMAGES**
(COUNT V), OR CONSEQUENTIAL DAMAGES (COUNT IV).

13 Fuel Medical requests punitive damages as part of its prayer for relief for its fraud claim
 14 and exemplary damages as part of its prayer for relief for its misappropriation of trade secrets
 15 claim. Dkt. 35 at 22, subparagraphs (b) & (e). The Supply Agreement, however, expressly
 16 precludes either party from seeking any "special, exemplary, punitive, or consequential
 17 damages" in any "suit, action, or proceeding . . . on or with respect to this Agreement or the
 18 dealings of the parties with respect hereto." *Id.*, Ex. A § 7.06; *see also id.* § 7.20
 19 ("Notwithstanding anything to the contrary set forth herein, in no event shall either party hereto
 20 be entitled to punitive, consequential or speculative damages, including damages for lost
 21 profits."). Contractual provisions restricting the availability of punitive and exemplary damages
 22 are regularly enforced under Delaware law. *See, e.g., O'Neill v. AFS Holdings, LLC*, No. N13C-
 23 02-189, 2014 WL 626031, at * 5 (Del. Super. Ct. Jan. 15, 2014); *Rob-Win, Inc. v. Lydia Security*

1 *Monitoring, Inc.*, No. 04C-11-276, 2007 WL 3360036, at *4 (Del. Super. Ct. Jan. 16, 2007).³

2 Thus, Fuel Medical's prayers for punitive and exemplary damages should be dismissed.

3 Fuel Medical also seeks consequential damages as part of its prayer for relief for its claim
4 for breach of the NDA. *See, e.g.*, Dkt. 35 at 22, subparagraph (d). The parties, however, waived
5 any rights to collect consequential damages as part of the Supply Agreement. *Id.*, Ex. A § 7.06
6 (waiving "any right to it may have to claim or recover . . . consequential damages"). The Court
7 should therefore dismiss Fuel Medical's requests for such damages. *See* Dkt. 1 at
8 subparagraphs (a), (b), (d), & (g); *Yellow Book USA v. Sullivan*, No. 1999-02-046, 2003 WL
9 1848650, at *7 (Del. Ct. of Comm. Pleas Feb. 20, 2003) (enforcing contractual provision barring
10 damages for lost profits).⁴

11 WHEREFORE, for the reasons stated above, Sonova USA Inc. respectfully requests the
12 Court dismiss Fuel Medical Group, LLC's complaint with prejudice and grant such other relief if
13 just.

23 ³ Washington law reaches the same result; "punitive damages are not allowed unless expressly authorized by the
24 legislature." *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 635 P.2d 441, 443 (1981); *Steel v. Johnson*,
25 76 Wn.2d 750, 458 P.2d 889, 890 (1969). This is also true of exemplary damages because "[e]xemplary damages'
are synonymous with 'punitive damages.'" *Hill v. Garda CL N.W., Inc.*, 191 Wn.2d 553, 424 P.3d 207, 217 (2018)
(citing Black's Law Dictionary 692 (10th ed. 2014)).

26 ⁴ Here again, the Washington law reaches the same result. *See Revolutionar, Inc. v. Gravity Jack, Inc.*, 2020 WL
2042965, at *15-16 (Wash. Ct. App. 2020) (enforcing contractual release of any claims seeking lost profits).

1 DATED this 15th day of September, 2023.

2 Respectfully submitted,

3 s/ Brian W. Esler

4 Brian W. Esler, WSBA No. 22168

5 Lane Conrad, WSBA No. 59287

6 Miller Nash LLP

7 605 5th Ave S, Ste 900

8 Seattle, WA 98104

9 Telephone: (206) 624-8300

10 Email: brian.esler@millernash.com

11 Email: lane.conrad@millernash.com

12 Ian H. Fisher, admitted *pro hac vice*

13 Paul J. Coogan, admitted *pro hac vice*

14 Taft Stettinius & Hollister LLP

15 111 East Wacker Drive, Suite 2600

16 Chicago, IL 60601

17 Telephone: (312) 527-4000

18 Email: ifisher@taftlaw.com

19 Email: pcoogan@taftlaw.com

20 Attorneys for Plaintiff Sonova USA Inc.

21 I certify that this memorandum contains 5,292
22 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties.

DATED this 15th day of September, 2023.

/s/ Kristin Martinez Clark

Kristin Martinez Clark